



COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 11-AR

September 23, 2013

Investigation by the Department of Telecommunications and Cable on its own motion, pursuant to G. L. c. 159, §§ 12, 32, and 39, and G. L. c. 166, §§ 11 and 12, regarding the failure by individually-named common carriers of telecommunications services to file annual returns for calendar years 2005, 2006, 2007, 2008, and/or 2009.

ORDER ON RECONSIDERATION AND VACATING JUDGMENT

In the matter of:

Dynalink Communications, Inc.	2008	11-AR-2
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I. INTRODUCTION

On August 16, 2013, Dynalink Communications, Inc. (“Dynalink”) filed a Combined Motion for Reconsideration and For Permission to Late-File (“Motion”) through which it filed its delinquent annual return and requested that the Massachusetts Department of Telecommunications and Cable (“Department”) reconsider findings made against Dynalink for the company’s failure to file an annual return. For the reasons discussed below, the Department grants Dynalink’s request for reconsideration and vacates the judgment against the company.¹

II. BACKGROUND AND PROCEDURAL HISTORY

On June 3, 2013, the Department issued three Orders involving numerous companies’ failure to file annual returns for calendar years 2005, 2006, 2007, 2008, and/or 2009. *See* Orders D.T.C. 11-AR-A (“Order A”), D.T.C. 11-AR-B (“Order B”), and D.T.C. 11-AR-C (“Order C”). In Order A, the Department, *inter alia*, found that Dynalink failed to file its 2008 Annual Return (“2008 Return”) due to the Department on March 31, 2009, and that the failure to file was unreasonable. Order A at 11. The Department assessed statutory forfeitures against Dynalink totaling \$20,845.00, mandated cancellation of the company’s Statement of Business Operations (“SBO”) and tariff on file with the Department, and directed compliance with the Department’s Mass Migration Requirements. *Id.* at 13-15.

Dynalink specifies that its failure to file its 2008 Return “was inadvertent” and likely due to a change in regulatory compliance companies several years ago. Motion at 2-3. Dynalink posits “that each of its compliance vendors thought the other one had addressed the report[,]”

¹ Pursuant to the Department’s procedural rules, a party may file a motion for reconsideration within twenty (20) days after issuance of a final Department order. *See* 220 C.M.R. § 1.11(10). Dynalink requested relief from this rule, since it filed its Motion for Reconsideration on August 16, 2013, more than twenty (20) days after issuance of Order A. Motion at 1, 3. However, the Department extended the effective date of Order A to one hundred and twenty (120) days after its June 3, 2013, issue date. Order A at 15. Although not clarified in Order A, the time period involving motions for reconsideration for Order A did not begin to toll until the effective date of that Order. As a result, the Department deems unnecessary Dynalink’s request to late-file and, therefore, does not rule on that aspect of Dynalink’s Motion.

resulting in the failure to file and failing to otherwise respond to any Department communications involving Dynalink's 2008 Return.² *Id.* at 2. Dynalink indicates that it "is developing, in conjunction with its new compliance vendor," additional safeguards for oversight of its regulatory obligations. *Id.* at 3-4. With its Motion, Dynalink also submitted its delinquent return with the appropriate filing fee. *Id.* at n.1. Dynalink requests that the Department reconsider its decision to cancel the company's SBO and tariff and seeks relief from the statutory forfeitures imposed on the company. *Id.* at 1, 3. Dynalink argues that good cause exists to grants its request. *Id.* at 3-4.

III. ANALYSIS AND FINDINGS

The Department's standard for reconsideration is well-settled. The Department grants reconsideration of previously decided issues only when extraordinary circumstances dictate that the Department take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. *Verizon Resale Tariff*, D.T.C. 06-61, Order on Reconsideration, at 5-6 (2012); *Western Mass. Elec. Co.*, D.T.E. 00-110-C, at 9 (2001); *Fitchburg Gas & Elec. Light Co.*, D.T.E. 98-51-A, at 5-6 (1999) ("*Fitchburg*"); *North Attleboro Gas Co.*, D.P.U. 94-130-B, at 2 (1995); *Comm. Elec. Co.*, D.P.U. 92-3C-1A, at 3-6 (1995); *Boston Edison Co.*, D.P.U. 90-270-A, at 3 (1991). Extraordinary circumstances warranting reconsideration include: (i) "previously unknown or undisclosed facts that would have significant impact upon the decision already rendered" newly brought to light, *Boston Edison Co.*, D.P.U. 90-270-A, at 2-3 (1991); or (ii) whether an issue was wrongly decided due to the Department's mistake or inadvertence. *Mass. Elec. Co.*, D.P.U. 90-261-B, at 7 (1991); *New*

² Although not expressly stated by Dynalink, the Department will assume that confusion arising from the company's change in compliance vendors also explains Dynalink's failure to otherwise respond to any Department communications involving Dynalink's 2008 Return. See Order A at 11 (noting the Dynalink's failure to respond, in part, to the Department's courtesy notices reminding the company to file its annual return, as well as its failure to respond to the Department's *Notice Opening Investigation* involving the delinquent return).

England Tel. & Tel. Co., D.P.U. 86-33-J, at 2 (1989). Further, the Department has broad discretion on whether to vacate a judgment. *See Complaint of MCI WorldCom, Inc.*, D.T.E. 97-116-E, *Order Denying Global NAPS, Inc.’s Motion to Vacate the Dept. Of Telecomms. and Energy’s Orders*, D.T.E. 97-116-C and D.T.E. 97-116-D/99-39, and to Reinstate D.T.E. 97-116-E, at 11, 13 (Jul. 11, 2000) (“D.T.E. 97-116-E”) (“[t]he Department rules on each motion in each proceeding based on the form and contents of the motion before it and on the specific facts before the Department at that time ... [and] has broad discretion to decide whether or not to vacate a judgment”). For the reasons discussed below, the Department reconsiders its cancellation of Dynalink’s SBO and tariff and vacates the judgment against the company.

The Department vacates the judgment against Dynalink, because Dynalink presents facts previously unknown or undisclosed on the record that would have had a significant impact upon the Department’s decision. Specifically: (1) the company has complied with its other reporting obligations with the Department (2009-current) and since filed its delinquent return; and (2) the statutory forfeitures, if applied, would far exceed the company’s 2008 reported revenues. *See* Motion at 3-4; Dynalink Annual Returns submitted for Calendar Years 2009-2012. *See also* D.T.E. 97-116. In particular, Dynalink indicates that the company had reportable intrastate operating revenue for the year at issue totaling \$12,673.00. Motion at 3; 2008 Return at 3. If the Department assessed the full statutory forfeitures against Dynalink, the amount would constitute nearly twice the amount of the company’s 2008 reported revenues. Based on these facts, the Department would have extended the filing deadline for Dynalink’s 2008 Return and dismissed the case against the company. *See, e.g., Investigation by the Dep’t of Telecomms. & Cable on its own motion, pursuant to G. L. c. 159, §§ 12, 32, 39, & G. L. c. 166, §§ 11, 12, regarding the failure by individually-named common carriers of telecomms. servs. to file annual returns for*

calendar years 2005, 2006, 2007, 2008, and/or 2009, D.T.C. 11-AR, Order D.T.C. 11-AR-B (“Order B”) (Jun. 3, 2013), at 9-10 (finding good cause to extend the filing deadline and dismissing the proceeding against the company based on reported revenues). Therefore, the Department reconsiders and vacates its judgment against Dynalink by extending the filing deadline for Dynalink’s 2008 Return to the date of receipt by the Department, August 16, 2013.

Although carriers must file an annual return by March 31, the Department may, for good cause, fix a date later than March 31 for a carrier to file its annual return. G. L. c. 159, § 32; G. L. c. 166, § 11. In determining whether good cause exists for an extension of the filing deadline, “the Department must weigh the carrier’s interest in receiving such an extension against the public’s interest and the interests of any other affected parties.” Order B at 12, *citing Pet’n of N.E. Tel. & Tel. Co. for an alternative regulatory plan for the co.’s Mass. intrastate telecoms. servs.*, D.P.U. 94-50, Order at 51-52 (May 12, 1995) (“*D.P.U. 94-50*”).

Although Dynalink’s return was delinquent, the company ultimately complied with the Department’s filing requirements. Dynalink’s failure to file timely and failure to previously respond to the Department’s communications “was inadvertent,” and the company’s interests in receiving an extension are substantial (forfeitures nearly double the company’s 2008 reportable revenue). Further, the Department knows of no other party that would be adversely affected by a decision to grant Dynalink an extension. The Department does not condone Dynalink’s oversight of its statutory requirements, but finds that the company acted in good faith by ultimately cooperating with the Department, otherwise timely filing its annual returns with the Department for all subsequent years, hiring a new compliance firm and instituting additional safeguards to ensure ongoing compliance, and providing assurances that it will file annual returns on a timely basis going forward.

Accordingly, the Department, for good cause, establishes August 16, 2013, as the filing deadline for Dynalink's 2008 Return. *See* G. L. c. 166, § 11; Order B at 13; *D.P.U. 94-50*. The Department extends this one-time courtesy to Dynalink with the expectation that Dynalink will comply with the Department's requirements going forward. As Dynalink's 2008 Return is now current, because the company otherwise has a history of compliance with the Department, and for the other reasons stated above, the Department grants Dynalink's reconsideration request and vacates the judgment against the company.

IV. ORDER

Accordingly, after consideration, it is

ORDERED: That the Motion for Reconsideration submitted by Dynalink on August 16, 2013, is GRANTED and the judgment against the company is VACATED.

By Order of the Department:

/s/ Geoffrey G. Why
Geoffrey G. Why
Commissioner

RIGHT OF APPEAL

Pursuant to G.L. c. 25, § 5 and G.L. c. 166A, § 2, an appeal as to matters of law from any final decision, order or ruling of the Department may be taken to the Supreme Judicial Court for the County of Suffolk by an aggrieved party in interest by the filing of a written petition asking that the Order of the Department be modified or set aside in whole or in part. Such petition for appeal shall be filed with the Secretary of the Department within twenty (20) days after the date of service of the decision, order or ruling of the Department, or within such further time as the Department may allow upon request filed prior to the expiration of the twenty (20) days after the date of service of said decision, order or ruling. Within ten (10) days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court for the County of Suffolk by filing a copy thereof with the Clerk of said Court.